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IN THE

Supreme Court of the United States

October Term 1973

JAY POBLINER,

Petitioner,

—against—

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI

HERBERT IRA HANDMAN, Esq.
Attorney for Petitioner
Office and P.O. Address
36 West 44th Street
New York, New York 10036

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

The Petitioner, Jay Pobliner, prays that a Writ of Certiorari issue to (1) review the judgment and decision of the Court of Appeals for the State of New York dated May 4, 1973 affirming the judgment and conviction entered against petitioner in the County Court, Nassau County, State of New York on December 9, 1970 and the affirmance of such conviction by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, on June 26, 1972 and (2) the Order entered September 18, 1973 by the said Court of Appeals of the State of New York denying the Motion for Reargument of the Petitioner with respect to said judgment of affirmance.

A. The Opinion Below

On May 4, 1973, on Petitioner's Appeal to the Court of Appeals of the State of New York, that Court affirmed the judgment of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department which had affirmed the conviction of Petitioner for murder, entered December 9, 1970 in the County Court, Nassau County, State of New York after a jury trial and verdict of guilty on October 23, 1970. The Order and the Opinion of the said Court of Appeals of May 4, 1973 are annexed hereto marked Appendix B. On September 18, 1973 Petitioner's Motion for a Reargument was denied without opinion. A copy of this Order denying reargument is attached hereto marked Appendix C.

B. Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Rules of the Supreme Court of United States and Title 28, United States Code, Section 1257 on the ground that review by the Supreme Court of United States is sought of a judgment of the affirmance on appeal by the Court of Appeals of the State of New York. An application for an extension of time to file this Petition was made to the Honorable Thurgood Marshall, a Justice of this Court on November 29, 1973. On the 7th day of December 1973, an order was entered extending the tiime to file this Petition to February 16, 1974. A copy of such order is appended to this Petition marked Appendix D.

C. Questions Presented

1. Does the massive illegal pre-indictment intrusion of Petitioner's privacy by wiretapping mandate a dismissal of the indictment?

2. Does the massive illegal pre-indictment intrusion into Petitioner's relationship with his Counsel mandate a dismissal of the indictment?

3. Was the Petitioner entitled to a full evidentiary hearing with respect to the constitutional purity of the prosecution where there was admitted illegal massive pre-indictment wiretap intrusion of Petitioner's privacy and into his relationship with Counsel?

4. Where the prosecution engaged in illegal massive pre-indictment wiretapping of Petitioner, must the prosecution prove beyond a reasonable doubt the constitutional purity of its case against the Petitioner?

5. Where the prosecution has engaged in illegal massive pre-indictment wiretapping of Petitioner, is Petitioner entitled to the Grand Jury Minutes in order to determine whether any constitutionally impure evidence was presented to the Grand Jury which handed down the indictment?

6. Where the prosecution has engaged in illegal massive pre-indictment wiretapping of Petitioner, is Petitioner entitled to inspect the Court Orders authorizing such wiretaps and the supporting papers?

7. Do the admitted and unexplained extensive blanks in the tapes of an illegal massive wiretapping which was monitored by taking notes require a dismissal of the indictment?

8. Did the action of the Trial Court in improperly granting immunity to certain witnesses deprive the Petitioner of due process of law?

9. Did the failure of the Trial Court to leave to the Jury the question of whether one of the prosecution wit-

nesses was an accomplice and to charge the Jury on this matter deprive the Petitioner of due process of law?

10. Did Petitioner receive a fair trial?

D. Constitutional Provisions, Statutes and Rules Involved

Constitutional Provisions, Statutes and Rules involved are as follows. This material is attached as Appendix E.

E. Statement of the Case

The Petitioner, Jay Pobliner, was convicted in the County Court, Nassau County, State of New York before Hon. Paul Kelly and a jury on an indictment for murder of his wife. Petitioner was sentenced to not less than 25 years nor more than his natural life.

Statement of Facts

On December 27, 1968 Petitioner's wife was found in her bedroom dead. She had been shot in the head. Petitioner was in New York City when he was advised to come home. He immediately left New York City and returned to his home in Nassau County.

He cooperated with the police by making voluntary statements and subjected himself to numerous scientific tests; a parafin test, lie detector test, etc. All these tests were negative. None of them in any way indicated any involvement by Petitioner.

Despite Petitioner's cooperation and the results of the tests, the Nassau police and prosecutors directed their investigation primarily against Petitioner.

Wiretaps were installed in the home of Petitioner's parents in Manhattan, where Petitioner was residing. These wiretaps included all conversations. The conversations were with Petitioner's attorneys, investigators, members of his family and various friends, one of whom became a prosecution witness. Many of the conversations with attorneys dealt with the pre-indictment investigation and related matters. The intrusion of Petitioner's privacy was massive and indiscriminate. The transcripts of the tapes and various summaries required 5 volumes totalling over 1500 pages. There are blank spaces in many of the recordings and there are tapes which are blank for unexplained reasons. The prosecution's own files show interceptions of conversations between Petitioner and his attorney where the tapes are missing and therefore there is no transcript.

Other than the testimony of one Joe Lyle Hall, who was an accomplice by his own testimony, the only evidence against Petitioner was circumstantial.

Hall was a psychotic with a criminal record. His testimony was that he provided Petitioner with the murder weapon, which was never found; that Petitioner had plotted with him to commit the crime; that subsequently in the presence of a total stranger, Petitioner had told him he had committed the murder.

Petitioner was indicted for the murder of his wife on March 28, 1969. He was arraigned the same day and entered a plea of not guilty.

There were two trials of Petitioner. Both were before Hon. Paul Kelly, Justice of the County Court, Nassau County and a jury.

The first ended in a mistrial. The mistrial was occasioned by Petitioner's disclosure to the Court that a pro-

posal had been made for the bribery of a juror in favor of the Petitioner.

The second commenced September 8, 1970 and ended October 23, 1970 when the jury found Petitioner guilty as charged.

On December 9, 1970 a Motion for a New Trial was made and denied and Petitioner was sentenced to 25 years to life.

An Application for a Certificate of Reasonable Doubt was denied in 1971. *People* v. *Pobliner,* 66 Misc. 2d 209, 320 N.Y. Supp. 2d 257. Petitioner has been incarcerated and still is.

An application for vacation of the Judgment of Conviction was made on June 23, 1971. Mr. Justice Kelly, on October 19, 1971 denied the Application without a hearing.

The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, on June 26, 1972 affirmed without opinion the Judgment of Conviction of December 9, 1970 and the Order denying the Application to vacate the judgment of October 19, 1971.

Leave to appeal to the Court of Appeals of the State of New York was granted September 13, 1972 and a Notice of Appeal to that Court was filed September 14, 1972.

On May 4, 1973 the Court of Appeals affirmed the Order of the Appellate Division above referred to in an Opinion, Appendix B. 32 N.Y. 2d 356, 345 N.Y.S. 2d 298 N.E. 2d 482, 637.

On July 13, 1973 the Petitioner moved for reargument of the Judgment of the Said Court of Appeals. This Motion was denied September 18, 1973. Appendix C. (Not yet officially reported).

ARGUMENT

POINT I

The massive illegal pre-indictment intrusion of petitioner's privacy by wiretapping mandates a dismissal of the indictment.

There is no question before the Court as to the illegality of the wire-taps. The Trial Judge so ruled and the Court of Appeals of the State of New York termed the interception of the lawyer-client telephone conversations as "grossly improper," and stated "the wiretap of attorney-client conversations was highly improper, raising a difficult question whether the indictment should be dismissed."

The question before this Court is what are the consequences of such a deliberate, shocking intrusion of a citizen's constitutionally protected privacy and right to Counsel.

The Court of Appeals of the State of New York took the position that unless there was some *prejudice shown by the Petitioner,* this invasion of his privacy and right to Counsel was harmless and Petitioner was not entitled to any redress (Appendix B).

Assuming arguendo that the cases cited by Judge Breitel in his Opinion stand for what His Honor says they do, we submit that neither the Trial Court nor the Court of Appeals had before it sufficient facts upon which to determine the prejudice or lack of prejudice arising out of the interceptions.

To make any realistic and fair appraisal of this question required an in-depth full evidentiary hearing, which was requested by Petitioner and denied.

It is too clear now to admit of any further doubt that prosecution representations or in-camera inspections by the Trial Judge will not suffice to protect an accused's constitutional rights.

Fortunately for Petitioner, this Court has had occasion to pass upon the standard of proof required of the prosecution in a case such as the instant one.

In addition to the standard of proof, there is also the question of the burden of proof.

Petitioner submits that the burden of proof and the duty to go forward is on the prosecution and further submits that the standard of proof is "beyond a reasonable doubt."

When this Court upheld the legality of compelled testimony after a grant of use immunity, it recognized the problem of the use of such testimony by the same or other prosecutors to secure collateral indictments. *Kastigar* v. *United States,* 406 U.S. 441 (1972).

In considering a prosecutor's claim that he used none of the evidence compelled from a defendant in securing a collateral indictment, this Court made it clear where the burden of proof rested.

> "This burden of proof, which we reaffirm as appropriate, is not limited to negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony" (406 U.S. at 460).

In Mr. Justice Marshall's dissent appears the following significant statement of the law (406 U.S. at 471):

> "The Constitution does not authorize police officers to coerce confessions or to invade privacy without

> cause, so long as no use is made of the evidence they obtain."

In the instant case, the prosecution denied the use of any of the illegal wire taps to secure leads or to aid the investigation or the prosecution. Hiding behind that mere denial, the Trial Court refused Petitioner access to the wire tap orders, the affidavits on which the Orders and any extensions were based, and all the other evidence which would have been available at an in-depth evidentiary hearing on the question of "taint."

In the recent case of *United States* v. *Siegel,* — F.2d — (2d Cir., Docket No. 73-1931, June 26, 1973) the Circuit Court of Appeals succinctly stated the necessary result of denying an accused access to evidence relative to wire taps (Slip Opinion at 4457):

> "To compel a party who objects to the use of evidence as a result of unlawful wire tapping to go forward with a showing of taint . . . and then to withhold from him the means or tools to meet that burden, is to create an absurdity in the law."

In *United States* v. *McDaniel,* 449 F.2d 832 (8th Cir. 1971), *cert. denied,* the United States Court of Appeals for the Eighth Circuit went so far as to hold that if the prosecution has seen compelled grand jury testimony, it is an evasion of the *Murphy* rule and any prosecution of the witness should be forbidden" (449 F.2d at 840).

> "If the federal government is allowed to prosecute despite the fact that it has seen the compelled testimony, there is clearly no deterrent to its seeking access to that testimony. Therefore, if, as argued above, Murphy is intended to forbid such access, the only effective sanction for this evasion of the *Murphy* rule is to forbid prosecution."

The rule announced in *Kastigar* has been vigorously and strictly enforced by the federal courts.

In *Matter of Samuel Lewis Goldberg* v. *United States*, 472 F.2d 513 (2d Cir. 1973) the Court of Appeals stated at page 516:

> "If Goldberg now answers the questions, and the government should seek to pursue him further, its burden of showing that it is not using the compelled testimony . . . in 'any respect' will be substantial as we warned the Assistant United States Attorney at argument."

In *United States* v. *Roman*, — F. Supp. — (S.D.N.Y. June 4, 1973) 13 Cr. L. 2257, the District Court dismissed counts of an indictment added after the United States Attorney had examined a transcript of compelled testimony even though there was a denial of any use.

The cases on compelled testimony are on all fours with illegal wire taps and Petitioner submits that the Motions to dismiss the indictment in this case should have been granted.

The foregoing argument is based on he Fourth Amendment rights of the Petitioner and the flagrant illegal violation of those rights by the prosecution. Petitioner submits that without more, the indictment should be dismissed without even the necessity of an evidentiary hearing on the question of "taint."

However, should the Court have any reluctance to so order such a dismissal based on the wholesale violation of Petitioner's Fourth Amendment rights, then it is important to point out that the Fourth Amendment violation was compounded and aggravated by the fact that Petitioner's Sixth Amendment right to counsel was also violated on a wholesale indiscriminate basis.

Petitioner submits that this Court has held and that it is the law of these United States that where intrusions of the kind which occurred here have taken place, the only inquiry to be made before a reversal is ordered, is whether such intrusions in fact occurred.

O'Brien v. *United States,* 386 U.S. 345 (1967);

Black v. *United States,* 385 U.S. 26 (1966);

Glasser v. *United States,* 315 U.S. 60 (1942).

POINT II

The prosecution failed to prove beyond a reasonable doubt the constitutional purity of the case.

Once the question of illegality is determined as it was here, the burden of proving the purity of the prosecution's case shifted to the prosecution.

This burden was not even recognized in this case nor was anything done to sustain it.

Judge Breitel's opinion relies on alleged waivers. This is patently unjustified and unsupported by the record.

Quite the contrary, if ever there was an admission that use of the wire taps had been made, it was the Prosecutor's belated request for a full hearing on the legality with the necessity of securing such a ruling to bolster his case (Appendix A, pp. 27-34).

Defense Counsel properly insisted that the Prosecutor's request was untimely and that it was the Prosecutor who had waived his right to have a hearing on the legality of something already held to be illegal, and which the Prosecutor said had not been and would not be used.

The prosecution contended that Petitioner waived his right to an evidentiary hearing on taint. The Court of Appeals went along with this position in a fuzzy way for nothing could be further from the truth.

On February 4, 1970 Petitioner's Counsel applied for a hearing "to demonstrate that there were leads developed" from the wire taps (Appendix A, pp. 13-26). This application was made after Petitioner's Counsel had spent some two weeks listening to some 49 reels of recordings.

The Prosecutor argued, as has often been done, that a "taint" hearing is "premature and anticipatory" since Petitioner's Counsel did not know what the prosecution's proof would be and suggested to the Trial Judge that "if during the course of the trial [Defense Counsel] feels that something is being brought out that we obtained as a result of these wire taps, then I say would be the proper time to conduct the hearing" (Appendix A, pp. 13-26).

Over Defense Counsel's strenuous objection, the Trial Judge had previously ruled there would be no pretrial hearing on the question of "taint."

This ruling was clearly error and nothing which occurred later in the proceedings served to cure such error. That this particular error was properly preserved for review is clear and unequivocal.

The case of *United States* v. *Birrell*, 269 F. Supp. 716 (S.D.N.Y. 1967) is often cited to justify the postponement of "taint" hearings in a difficult case. Such postponement is unfair and prejudicial to any accused.

The above *Birrell* case is no longer authority in view of the opinion and decision of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Birrell*, — F.2d — (1972) where, in an opinion by Chief Judge Friendly,

the postponement of a hearing on a suppression motion was clearly disapproved.

In sum, Petitioner submits that the prosecution by its massive and indiscriminate illegal wire tapping created a situation where the prosecution had the duty of going forward with a full and in-depth evidentiary hearing in order to prove the constitutional purity of its case.

Relegating Petitioner's Trial Counsel to *voir dire* of witnesses for the prosecution could not and did not satisfy the obligation and burden of the prosecution (Appendix A, pp. 13-26).

Whether the standard of proof required be "clear and convincing" or "beyond a reasonable doubt" is beside the point when there was no evidentiary hearing on the question of "taint."

Petitioner submits, further, that the Trial Judge's rulings on the two witnesses where a *voir dire* was had were clearly erroneous (Appendix A, p. 117).

The Trial Judge used the standard of proof "clear and convincing" (Appendix A, p. 117).

In the light of the cases of compelled testimony cited *supra,* Petitioner submits that Judge Weinstein in *United States* v. *Schipani,* 289 F. Supp. 43, 47 affd. 414 F.2d 1262 (2d Cir. 1969) states the applicable law, which

> "is to require the Government to prove *beyond a reasonable doubt* that the evidence it introduces was legally obtained. . . . It is fitting that the Government bear the burden of proof and that it be a high one" (Emphasis added).

POINT III

The Prosecution's case was in fact tainted.

In case there is the slightest doubt, as to the use by the prosecution of the "fruits" of the massive violation of Petitioner's privacy and right to counsel, Petitioner has attached to this Petition as Exhibit X, a newspaper article in which the Prosecutor openly attributes the prosecution's expected successful investigation of the crime to the wire tapping which took place.

The People's position is that even if there was massive violation of Petitioner's Fourth Amendment right to privacy and equally massive violation of Petitioner's right to the effective assistance of counsel, Petitioner is entitled to no relief or redress because the People made no use of any information secured through such unconstitutional conduct.

In the first place this Court has already rejected these subjective self-serving declarations and placed on the prosecution in such cases the burden of objective proof (*supra* Point I).

In the second place there are many blanks in the tapes. These blanks were never explained and they are so exensive as to preclude any claim of accident. There are even notes of conversations made by the detectives who were monitoring the interceptions where the tapes are blank. One of such incidents relates to Petitioner's conversation wih his counsel Mr. Maurice Edelbaum. Strangely there are monitors notes of only one such conversation.

Petitioner asserts unequivocally that there were innumerable conversations between Petitioner and his two attorneys Messrs. Handman and Edelbaum which do not appear on the tapes and of which there are no monitors' notes.

The denial by the Trial Judge of Petitioners applications for access to the wire tapping orders and supporting papers and the Trial Judge's further denial of a full evidentiary hearing effectively prevented Petitioner from showing these facts. At such an evidentiary hearing there would have been objective proof required. Petitioner submits that under the circumstances of this case, it is inconceivable that the prosecution could have sustained its burden of proof as to the constitutional purity of its case.

However, even though there was no such objective proof because of the Trial Court's conduct, the Record clearly demonstrates that use was made of the illegally intercepted conversations of Petitioner.

The prosecution's cross-examination of Illis Jurisson, the principal witness for the defense, was openly and admittedly based on conversations between Petitioner and his attorney (Appendix A, pp. 376-397).

Jurisson had been a guest at Petitioner's home at the time during which the prosecution claimed Petitioner's wife was murdered. Jurisson's testimony was sufficient to establish Petitioner's innocence of the crime of which he was convicted.

Unless Jurisson's credibility was destroyed in some way by the prosecution, Petitioner could not have been convicted.

The prosecution's efforts to destroy this credibility are clearly shown by the following excerpt from his summation (Appendix A, pp. 398-399).

> "Now Illis Jurisson, let us take care of Mr. Illis Jurisson * * * a witness who received $800.00 from Mr. Herman Pobliner to pay for his visit to the hospital * * * who has a motive to lie? Who has a motive to lie and who put him in the hospital, and I ask you

this, gentlemen, and I ask you to consider this when it comes to who put Mr. Illis Jurisson in Gracie Square Hospital? * * * Into a hospital for a period of six weeks, where he received electric shock treatments."

How did the prosecutor find out about the matters referred to which were developed on cross-examination.

Admittedly and openly from the following illegally intercepted conversations between Petitioner and his attorney.

January 21, 1969 (Appendix F (A-588)):

"Herbert: Jay, I—I just called the doctor at the hospital. He's asleep.

Jay: Thank God."

Another overheard conversation between Handman and Petitioner revealed the closeness of Petitioner's relationship with Jurisson, the fact that Jurisson was hospitalized at Gracie Square Hospital, and the extent of Petitioner's concern with Jurisson's psychiatric treatment (Appendix F (A-621-3)):

"Herb: I—I would say that—oh, the doctor, I mentioned this to the doctor. The doctor said that what we had decided was the best course, to say that he must have the doctor's since he signed himself in, he must have the doctor's authorization to leave, and that the doctor will not give it unless he cooperates.

Jay: Right.

* * * * *

Jay: Did he say he was any better today, or anything?

Herb: Yes, he did say he was definitely better, and he did say that he felt hopeful, if he remains there for treatment. Uh—however, he did say this,

that if he were to go out, he said this will become a recurrent—uh—illness, and he said that unless he's treated now completely—uh—things could be pretty bad.

Jay: Uh huh.

Herb: So he definitely would not recommend his release. He said he had dealt with many similar cases before and said the only—the only practical or feasible thing to do was just leave him there and let them treat him.

• • • • •

Herb: No, he said it would take—it would take a couple of days to get him out of the—get him calmed down, and then—then he said—he—you know, he'd see from there. It all depends. Until he's completely calmed down though, there's really nothing they could do except try to get him calmed down.

Jay: But, in other words, they are sedating him?

Herb: Right."

Additionally, the prosecution became privy to the fact that Jurisson's treatment included electro-shock therapy (Appendix F (A-1291)):

"Jay: His mother said that she signed a release, but she didn't realize what it was for or something—I don't know. Anyway, she's all—all upset, and this girl was ready to call in this Dr. Cammer, who—I believe he's head of the hospital there.

Herbert: Right (inaudible).

Jay: And so forth. She wanted to call him because she's all upset and Mark's all upset, because shock treatments can cause permanent mental damage.

Herbert: Who's upset now, just Mark?

Jay: Well, that—that's his fiancee that works for psychiatrists and (inaudible) and so forth. She's the one that gave me those names."

* * * * *

Appendix F (A-1298):

"Jay: * * * I mean maybe this would make her realize (inaudible), but I don't know if it did, and she's making a big thing out of this electric shock therapy.

Herbert: Well, her doctor recommended it, so let—let her call me."

and that the Pobliner family was paying for Jurisson's hospitalization (Appendix F (A-1294)):

"Jay: No, I tried to explain to her, and maybe—I said, 'Elaine, believe me,' I said—I said, 'The company is picking up some of this,' I said, 'My father has been helping me a little bit.' I said, 'I had to lay out $900, but I've got to lay out more,' I said, 'Personally, I don't have that kind of'—I didn't want to let her know that, you know—

Herbert: Right.

Jay: I felt maybe this would calm her down a little.

Herbert: Right.

Jay: I'm trying to tell you because she's going to call you.

Herbert: Uh huh.

Jay: I said, 'He's getting the best of care.' I said, 'We're not looking, trying to throw him into a crummy place or anything. We want him to have the best. The consultant was called in was the man that you recommended even.'

Herbert: Right."

The prosecutor in his cross-examination of Jurisson unequivocally and openly used the information secured from the foregoing illegally intercepted attorney-client conversations (Appendix A, pp. 376-397):

"Q. Who took you to the hospital? A. Mr. Handman and Jay Pobliner."

* * * * *

"Q. What kind of treatment did you receive? A. I received sedation and electrotherapy."

* * * * *

"Q. Who paid your bills at the hospital? A. I did and Squibb.

Q. Pardon me? A. I did and Squibb Products.

Q. Did you ever tell anyone that you had to pay part of it? A. Excuse me?

Q. That you had to pay part of it? A. Right.

Q. How much did you have to pay? A. $900.00.

Q. Where did you get it from? A. Mr. Pobliner."

Such use of illegally secured information clearly requires a reversal of the judgment of conviction.

Massiah v. *United States*, 377 U.S. 201 (1964);

Pointer v. *Texas*, 380 U.S. 400 (1965);

Hoffa v. *United States*, 385 U.S. 293 (1965);

Burgett v. *Texas*, 389 U.S. 109 (1967).

The People's position that Petitioner's rights were somehow waived by his counsel not making or renewing objections during the trial is ridiculous on its face.

The following excerpt from the Trial Record conclusively supports Petitioner's position as to any necessity to

keep renewing objections to the use of the illegally secured evidence. Defense counsel (Appendix A (66)):

> "I say the tapes on the face are illegal because—and I am talking about all of them, regardless of anything else, because on these tapes Mr. Herbert Handman was the attorney at the beginning of this investigation and then I was retained as trial counsel.
>
> Now, on these tapes there are conversations with attorney Handman, between the defendant and the attorney, there is one conversation with Mr. Edelbaum, the present attorney.
>
> There are one, two, three, four, five, six, seven eight, nine, ten eleven—about twelve conversations with attorneys of the defendant on these tapes and also revelations of what investigator [sic] was going to do, the fact that I have retained some expert to examine the home with respect to the blood, the fact that I had an investigator going out to interview certain witnesses. All this was revealed on the tapes and I say it is a direct violation of the defendant's constitutional rights."

This motion was denied (Appendix A, pp. 66-69).

POINT IV

The trial court's improper granting of immunity to prosecution witnesses deprived petitioner of due process of law.

The prosecution witness Lilliane Scudder was granted immunity from prosecution for adultery in order to induce her to testify (Appendix A, pp. 42-63).

Such granting of immunity was wholly outside the common law or any Statute of the State of New York.

The testimony of Scudder was material and damaging to Petitioner.

Petitioner's standing to challenge this grant was disputed by the prosecution. This very point was raised in *Ellis* v. *United States,* 416 F.2d 791 (D.C. Cir. 1969) and the standing of a defendant in Petitioner's situation was upheld in the following language: at p. 798,

> ". . . a defendant does have standing . . . to complain that his conviction was obtained in a case where the trial judge went outside his judicial province to grant immunity to a witness."

The granting of such immunity by the Trial Judge denied Petitioner his right to due process of law."

The Trial Court at first ruled that there was no legal basis to grant the witness Scudder immunity (Appendix A, pp. 42-63). Later the Court reversed itself and held that immunity could be given on the incredible basis that there was a crime of "conspiracy to commit adultery." The Rule thus announced goes back to common law and is known as "Whartor's Rule." *Gebardi* v. *United States,* 287 U.S. 1112 (1932). There is no such crime, nor could there possibly be. This Court has long ago held that where two people must act jointly to commit a crime, there cannot be any conspiracy to commit that same crime.

POINT V

The failure of the trial court to leave to the jury the question of witness Hall being an accomplice and to charge the jury on this matter deprived petitioner of due process of law.

1. History of Relationship and Events Subsequent to November, 1968

Hall testified that he had known Petitioner for six years, having met him in Asheville in 1965 (Appendix A, p. 118). At that time Petitioner was living and working in Asheville and returning home to New York on weekends (Appendix A, p. 119). The two saw each other on social occasions from time to time, and it was Hall who introduced Petitioner to his wife, Brenda, in the latter part of 1965 (Appendix A, p. 119). After Petitioner's Marriage in 1966, Hall next saw the Pobliners in November, 1968 at a dinner in Asheville (Appendix A, p. 120). On the night following the dinner, Petitioner saw Hall at Hall's club, the "Some Place Else", and arranged a meeting with him at the club on Sunday (Appendix A, p. 121).

Hall and Petitioner met on Sunday—about November 17, 1968—and Petitioner asked him if he could get him an unregistered untraceable pistol, which Hall says he agreed to do (Appendix A, p. 123). Hall obtained a .22 caliber single action revolver and a box of ammunition from Glenn Bell, a co-worker at the local radio station, and gave it to Petitioner on Wednesday night at the "Some Place Else" club (Appendix A, p. 124). Appellant paid him for it (Appendix A, p. 126).

In mid-November, 1968, Petitioner told Hall that he and a friend of his in New York by the name of Eddie had discussed killing their respective wives and that he wanted Hall's assistance (Appendix A, p. 127). Petitioner asked Hall to obtain a car for him and said that he, Eddie, and

their wives were coming to North Carolina on December 30 to celebrate New Year's Eve (Appendix A, p. 127). Petitioner told Hall that he and Eddie would lay out a definite plan for killing their wives, that they intended to shoot them in a remote section of Asheville and then leave the scene in a car which Hall was to park there by prearrangement (Appendix A, p. 127). Hall told Petitioner that he did not want any money for helping him though Petitioner offered him $2,500 (Appendix A, p. 131).

On first being interrogated by Nassau County police in January, 1969, Hall, with the claimed intent of giving the authorities a false scent, told them about Frank Gaddis, a man Petitioner had once reported to the FBI as a potential presidential assassin (Appendix A, p. 133).

Petitioner visited Hall in the latter part of January, 1969, while Hall was a patient at the Memorial Hospital in Asheville (Appendix A, p. 136). The visit took place in a semi-private room which Hall occpuied with another man (Appendix A, A-137-A-138). During the visit, Petitioner was asked by Hall:

> "Well, who shot Brenda?

Hall testified that Petitioner responded in a normal tone of voice in the presence of the other patient, a complete stranger,

> [He] took his thumb and pointed to himself and he said, 'I did'" (Appendix A, p. 138).
>
> * * * * *
>
> "He told me, he says, 'I did it but I feel that I didn't do it and I am very sorry that I did it, and I want you to feel the same way'" (Appendix A, p. 138).

Hall then asked him about the gun:

> "Q. What did you say to him about a gun and what did he say to you? A. I asked him, I said, 'Did you use the gun that I sold you?' And he said, 'Yes'.

Q. Anything further about the gun? A. Yes. I asked him what he did with the gun. He said, he threw it in the river" (Appendix A, p. 138).

Hall also testified that Petitioner told him how he had fixed a bottle for his baby on that morning, that his friend Illis Jurisson, who was supposedly present to serve as an alibi, was standing by his side when he killed his wife, and that he had passed the police-administered paraffin test because he had covered his hands when firing the gun (Appendix A, p. 140).

In the latter part of February, 1969, Hall told Petitioner that he needed $1,500 to pay taxes incurred by the nightclub (Appendix A, p. 156). At Hall's request Petitioner agreed to co-sign a note at one of the local banks in Asheville (Appendix A, p. 157). However, rather than co-sign a note Petitioner sent Hall $1,500 in cash over a three-week period (Appendix A, pp. 158, 159). Hall promised Petitioner that he was going to use the money to pay the taxes due by his club but instead used the money for general living purposes (Appendix A, p. 160).

The prosecution's case depended on Joe Lyle Hall. Without his testimony there would have been no prosecution.

By his own testimony (which Petitioner has at all times denied as the truth)*—he was clearly an accomplice. The

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* Petitioner's position is that even though Hall's testimony was false, still for the purposes of the charge to the jury it must be taken as true. In considering Hall's testimony it is important to call attention to Hall's background.

1. He was an admitted psychotic. Not only had he consulted a Dr. Leon Newbold a qualified psychiatrist on several occasions but he had been a patient at a mental health clinic.

2. He had been convicted of passing bad checks nine or ten times.

[Footnote continued on following page]

Trial Judge should have so ruled as a matter of law. If the Trial Judge had any doubts about the facts, he was duly bound to submit the question to the jury with proper instructions.

A. Hall testified he provided Petitioner with the murder weapon with prior knowledge of its intended use.

B. Hall testified he had agreed with Petitioner to participate in a plot to murder Petitioner's wife.

C. Hall testified he asked for and received money from Petitioner.

As this Court stated in *United States* v. *Pinkerton*, 328 U.S. 640 (1946) the real test of the accomplice question is the sharing of the criminal intent: at page 647.

> "The unlawful agreement contemplated exactly what was done."

Section 399 of the New York Code of Criminal Procedure spells out the required instructions in such a case. The Trial Judge did nothing in this regard.

The disregard of Petitioner's fundamental rights as to a proper instruction to the jury deprived him of due process of law.

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3. Shortly after his grand jury testimony in this case, he so savagely assaulted a young girl as to require her emergency hospitalization.

4. His occupations included disc jockey, night clubs and dance studios.

CONCLUSION

The interests of justice require that the indictment be dismissed or at the minimum a new trial be granted.

Respectfully submitted,

HERBERT IRA HANDMAN, Esq.
Attorney for Petitioner
Office and P.O. Address
36 West 44th Street
New York, New York 10036

EXHIBIT "X"

Newspaper Article Re Use of Wiretaps

(New York Post, Tuesday January 27, 1970)

Wire Taps String Slay Case Together
By George Carpozi Jr.

Nassau District Attorney Cahn has made extensive use of court-approved wire taps in building a murder case against garment manufacturer Jay T. Pobliner, it was learned today.

Sources close to the prosecutor's office indicated that more than 40 separate transcripts of conversations bearing on the slaying of Pobliner's wife, Brenda, 29, have been obtained as evidence for the trial in Nassau County Court in Mineola.

Now in its second week, the trial has not yet come into open court. Every session has been held in Judge Paul Kelly's chambers, where defense attorney Maurice Edelbaum has insisted on listening to each of the tapes.

SUCCESSFUL TECHNIQUE

In the past, Cahn has had considerable success with legal wiretapping in court. Several years ago he tapped a number of business executives, who were availing themselves of the services of a "housewives' prostitution ring." More recently, he won a U.S. Supreme Court test on the constitutionality of wiretaps used in the conviction of two hoodlums who had strong-armed juke-box operator Irving Holzman in his Long Island Home.

The tapes in the recent case ostensibly were made after Mrs. Pobliner was found shot to death in the bedroom of the couple's $50,000 waterfront home in Merrick on Dec. 27, 1968.

Mrs. Pobliner, mother of a son Neil, now 2½ years old, was found in bed with three bullet wounds in the head.

A woman neighbor discovered the body after Pobliner phoned her from his office in Rosalind Sportswear Corp., 601 W. 26th St., and asked her to check on his wife because she was not answering his call.

Arrested 3 Months Later

Pobliner was arrested on the charge of killing his wife three months after the crime, following the testimony of a Long Island housewife and mother before the grand jury.

Cahn's office said the woman, who has not been identified, was Pobliner's mistress.

Cahn's detectives are believed to have tapped Pobliner's phones during the period following his wife's murder and the time the grand jury returned the indictment against him.

When the trial reaches open court, there will be another preliminary legal procedure—a Huntly hearing to determine the admissability of statements Pobliner allegedly made to Nassau County homicide detectives and investigators from Cahn's office.

It is not expected that jury selection will begin before next week.